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No. 82-1643

In the Supreme Court of the United States

OCTOBER TERM, 1983

INTERSTATE COMMERCE COMMISSION, ET AL.,
PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the Interstate Commerce Commission has the authority, in cases where a tariff is filed and becomes effective but is thereafter found to have violated an approved motor carrier rate bureau agreement, to invalidate the filing upon discovery of the violation and thereby render the unlawful tariff void ab initio.

PARTIES TO THE PROCEEDING

The United States was a respondent below and is a petitioner here. Respondents here include, in addition to the American Trucking Associations, Inc., the following original petitioners below: Central State Motor Freight Bureau; Central and Southern Motor Freight Tariff Association Inc.; Eastern Central Motor Carriers Association; Middle Atlantic Conference; Middlewest Motor Freight Bureau; National Motor Freight Traffic Association Inc.; New England Motor Rate Bureau Inc.; Niagra Frontier Tariff Bureau Inc.; Pacific Inland Tariff Bureau; Rocky Mountain Motor Tariff Bureau Inc.; and Southern Motor Carriers Rate Conference. Respondents here also include the following intervenors below: The National Small Shipments Traffic Conference, Inc.; the Drug and Toilet Preparation Traffic Conference, Inc.; the National Association of Specialized Carriers, Inc.; Ohio Motor Freight Tariff Committee Inc.; Household Goods Carriers Bureau Inc.; Steel Carriers Tariff Association Inc.; Heavy & Specialized Carriers Traffic Bureau; Alaska Carriers Association Inc.; Bulk Carriers Conference Inc.; and Motor Carriers Traffic Association, Inc.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 688 F.2d 1337. The decisions of the Interstate Commerce Commission (J.A. 4-16; Pet. App. 32a-72a, 73a-84a, 85a-91a) are reported at 45 Fed. Reg. 55734, 46 Fed. Reg. 30092 and 364 I.C.C. 921.

JURISDICTION

The judgment of the court of appeals (Pet. App. 92a-93a) was entered on October 12, 1982. A petition for rehearing was denied on January 7, 1983 (Pet. App. 94a-95a). The petition for a writ of certiorari was filed on April 7, 1983, and was granted

on June 20, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Pertinent provisions of the Motor Carrier Act of 1980, 49 U.S.C. (Supp. V) 10706, 10762, 11701, and 11705 are set forth at Pet. App. 96a-100a.

STATEMENT

1. Under the Interstate Commerce Act, 49 U.S.C. (& Supp. V) 1 *et seq.*,[1] carriers establish and change their rates for transportation services by filing rate schedules, known as tariffs, with the Interstate Commerce Commission. A tariff filed with the Commission generally becomes effective only after a waiting period.[2] During the waiting period, the Commission entertains any protests against the rate and decides whether to reject it, suspend its effectiveness, investigate it, or permit it to become effective without investigation. See 49 U.S.C. 10762(e), 10707, 10708. Once a tariff is in effect, carriers must charge and shippers must pay the rates named in the tariff. 49 U.S.C. 10761.

Until 1979, the Commission examined every filing for obvious defects prior to the tariff's effective date. Tariffs containing serious errors were rejected, and the carrier was required to refile an acceptable tariff.

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[1] Hereafter, references to 49 U.S.C. will be to the current statute, printed in Supp. V, unless otherwise indicated.

[2] The waiting period for railroad rates is 20 days (10 days for reductions). 49 U.S.C. 10762(c)(3). Motor carrier rates become effective after 30 days. 49 U.S.C. 10762(a)(2). The Commission has the power to shorten the waiting period. 49 U.S.C. 10762(d)(1).

When an insubstantial error was discovered, the Commission either required prompt correction, or advised the carrier of the error and requested that it take more care in the future. Because this preexamination procedure minimized the possibility that a tariff containing errors would become effective, the Commission generally imposed no penalty on those rare occasions when an error was discovered after a tariff had gone into effect.

When budget reductions forced the Commission to reallocate its scarce resources, the Commission determined that it could no longer maintain sufficient tariff examiners to preexamine every filing. Accordingly, in October 1979, the Commission began reviewing only a random sample of tariff filings.[3] As a practical matter, therefore, unless a defect is called to the Commission's attention by an interested party, virtually all tariffs filed with the Commission automatically go into effect.

2. Since 1948, motor carriers subject to regulation by the Commission have been authorized by the Reed-Bulwinkle Act (ch. 491, 62 Stat. 472, now codified at 49 U.S.C. 10706(b)) to enter into rate agreements with other carriers.[4] The carriers have established rate bureaus to facilitate the negotiation of collective rates. The rate bureaus act as their members' agents in submitting to the Commission tariffs containing the collective rates, and also tariffs containing rates established by their individual members. Although in

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[3] Currently, the Commission examines only the title pages of tariff filings.

[4] Although the Reed-Bulwinkle Act also applies to rail carriers (49 U.S.C. 10706(a)), this case involves only motor carriers and shippers.

collective ratemaking carrier members of the bureau meet and determine the rates to be submitted to the Commission, "creating essentially a forum for cartelization" (Pet. App. 2a), the carriers' activities in a rate bureau do not violate the antitrust laws, so long as the agreement establishing the bureau has been approved by the Commission, and the carriers' actions conform to the agreement. 49 U.S.C. 10706(b). See *Motor Carriers Traffic Association* v. *United States*, 559 F.2d 1251, 1253-1254 (4th Cir. 1977), cert. denied, 435 U.S. 1006 (1978).

Until Congress enacted the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, 49 U.S.C. 10101 *et seq.*, the Commission had broad discretion to define the conditions under which it would approve rate bureau agreements. See Pet. App. 2a; 49 U.S.C. (1976 ed.) 5b(2); H.R. Rep. No. 1100, 80th Cong., 1st Sess. 4 (1947). In Section 14 of the Motor Carrier Act of 1980 (94 Stat. 803), however, Congress enacted specific statutory restrictions with respect to rate bureaus and rate bureau agreements. Motor carrier rate bureaus must comply with these statutory restrictions if they wish to maintain their antitrust immunity. Among other things, the statute requires disclosure of membership (49 U.S.C. 10706(b)(3)(A)); imposes limits on discussions of and actions on proposed rates (49 U.S.C. 10706(b)(3)(B)); guarantees the rights of bureau members to act independently (*ibid.*); and requires timely action on proposed rates (49 U.S.C. 10706(b)(3)(B)(vii)). More specifically, the Act restricts voting on collective proposals to those carriers that have authority to participate in the transportation to which the proposal applies; bars bureau protests of any motor carrier rate proposed by an individual carrier; limits dis-

cussion of general rate increases to industry average costs; imposes strict limits on bureau handling of independent action proposals; requires completely open bureau meetings; and bars any discussion of, or voting on, single-line rates[6] after January 1984. 49 U.S.C. 10706(b)(3)(D).[6]

In considering the 1980 Act, Congress explained that one of its primary aims was to develop "a legislative solution aimed at increasing competition" (H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 3 (1980)).[7] The activities of rate bureaus constitute an extraordinary exception to the usual rules condemning absolutely collusive activities to set prices; the specific purpose of Section 14 was to limit severely the permissible scope of such collusive ratemaking by these bureaus (H.R. Rep. No. 96-1069, *supra*, at 3-4, 10, 27-29; S. Rep. No. 96-641, 96th Cong., 2d Sess. 13-14 (1980)).[8]

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[6] Single line rates are those offered by a carrier over its own lines, not involving the services of other carriers.

[6] Section 14(a) also requires the bureaus to submit new agreements incorporating the statute's restrictions to the Commission for approval (49 U.S.C. 10706(c)).

[7] The Senate Report notes (S. Rep. No. 96-641, 96th Cong., 2d Sess. 14 (1980)): "evidence in the record does not support the contention * * * that trucking transportation is so different from all other forms of economic activity in the country that it, and it alone, should be allowed to exercise this extraordinary immunity from antitrust laws"—*i.e.*, the right to discuss and vote on single line rates.

[8] In addition, Congress established an independent study commission to consider "the need, if any, for continued antitrust immunity" for collective ratemaking (H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 4 (1980)). See also 49 U.S.C. 10706(i)(1) (Federal Trade Commission and Antitrust Division of Department of Justice to issue publicly available periodic reports to Commission on possible anticompetitive

3. The Commission implemented Section 14 with the rules adopted in *Motor Carrier Rate Bureaus-Implementation of P.L. 96-296*, Ex Parte No. 297 (Sub-No. 5) (ICC Dec. 19, 1980) (Pet. App. 32a-72a).[9] Although Ex Parte No. 297 implements and interprets the full range of the provisions in Section 14 of the Motor Carrier Act of 1980, this case, at this stage, involves only the Commission's decision (Pet. App. 66a-68a) that tariff rejection is an appropriate remedy for proven violations of rate bureau agreements. The Commission noted (Pet. App. 66a) that in an interim decision of August 1980 (J.A. 9), it had "expressed concern for the lack of definite remedies for proven rate bureau violations [and] * * * anticipated a need for immediate administrative remedies to assure the integrity and consistency of our regulation. [Accordingly, the Commission had] proposed to adopt a standard providing that proof of significant violations of an approved agreement will result in tariff rejection". After considering the comments received, the Commission concluded that it would exercise its authority under 49 U.S.C. 10762(e)[10] to

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features of rate bureau operations and agreements, and ways to alleviate or correct these features).

[9] Instead of proposing regulations in codified form for inclusion in the Code of Federal Regulations, the Commission published in Ex Parte No. 297 "a narrative description of the conditions and restrictions that must be contained in rate bureau agreements in order to obtain ICC approval" (Pet. App. 2a-3a).

[10] That section provides:

> The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

reject tariffs even after they have gone into effect, in cases where there is a "significant" and "clear" violation of an approved agreement (Pet. App. 66a, 68a).[11] The Commission explained (Pet. App. 67a):

> Pursuant to 49 U.S.C. 10762(e), the Commission is expressly authorized to reject tariffs published in violation of the act or our regulations. See *Acme Fast Freight, Inc. Common Carrier Application* [17 M.C.C. 549 (1939), affirmed sub nom. *Acme Fast Freight* v. *United States*, 30 F. Supp. 968 (1940), affirmed, 309 U.S. 638 (1940)]. The courts have concluded that regulatory agencies possess inherent authority to reject tariff matter and have construed that authority to extend beyond technical requirements of form and order. *Municipal Light Bds.* v. *FPC*, 450 F.2d 1341, 1346 (D.C. Cir. 1971), cert. denied, 405 U.S. 989 (1972).

A tariff rejected after its effective date is considered void ab initio. Accordingly, because the carrier has collected charges that exceed the applicable rate contained in a properly filed tariff, the carrier is

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[11] Where a lesser violation of an agreement is shown prior to a tariff's effective date, the tariff will be suspended and/or investigated (J.A. 9; Pet. App. 78a). After the tariff becomes effective, if the violation is not serious enough to merit rejection, the Commission could require the correction of the violation, and either cancel the tariff until that is done (establishing a reasonable rate for the interim), or permit the tariff to remain in effect until the correction is made. The Commission also noted (Pet. App. 68a) that it would continue to refer to the antitrust authorities the results of Commission investigations into alleged violations of bureau agreements, and would continue its practice of withdrawing approval of agreements of bureaus that failed to adhere to approved procedures. The suspension remedy and the remedies of investigation, referral or withdrawal are not at issue here.

liable to refund, as overcharges, all amounts collected in excess of the rates named in the last lawfully filed tariff. See 49 U.S.C. 11705(b)(1).[12] Overcharge liability attaches without regard to whether the rates named in the rejected tariff are otherwise reasonable and nondiscriminatory, and without regard to whether shippers were actually damaged by paying the higher rates.[13] The Commission explained (Pet. App. 68a):

> [T]he only permissible activity which enjoys immunity from the antitrust laws is that carried out under the detailed procedure in the agreement and bylaws. We intend to enforce vigorously compliance with these procedures so that the public may enjoy the benefits Congress anticipated when it enacted the rate bureau provisions of Public Law 96-296.

The Commission also made clear (Pet. App. 82a, 90a) that before a tariff is rejected, the rate bureau involved will have an opportunity to be heard and a right to appeal. In sum, the Commission stated, the rejection remedy will not prevent the bureaus "from establishing lawful rates but only rates formulated in violation of the antitrust laws" (Pet. App. 82a).

4. The major motor carrier rate bureaus[14] filed a petition in the court of appeals to review the Com-

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[12] Section 11705(b)(1) provides: "A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title is liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff filed under subchapter IV of chapter 107 of this title."

[13] Shippers who have been so damaged may seek relief under 49 U.S.C. 11705(b)(2) (for rail and water carriers) or 11705(b)(3) (motor carriers and freight forwarders).

[14] These rate bureaus are identified at page II, *supra*.

mission's interpretation and implementation of Section 14 of the Motor Carrier Act of 1980, as permitted by 28 U.S.C. 2344 (see also 28 U.S.C. 2321, 2341). Several groups representing shippers intervened as petitioners (Pet. App. 1a n.1; p. II, *supra*)).[15] Petitioners in the court of appeals challenged Commission rules pertaining to advance notice of independent action by individual carriers; cancellation of outstanding special permission authorities waiving statutory tariff filing procedures; limitations on discussion of general rate increases; authorization of sound recordings at open bureau meetings; and the interpretation of the statute's restrictions on discussion of rates that limit liability (Pet. App. 10a-24a). They also challenged the Commission's decision to reject tariffs that involve significant violations of rate bureau agreements, contending, *inter alia*, that the power to reject expires when a tariff becomes effective.

5. The court of appeals upheld virtually all of the Commission's proposals in Ex Parte No. 297,[16] with one significant exception: it held that the Commission has no power to reject tariffs once they have become effective. The court confirmed the Commission's power to reject tariffs that violate rate bureau agreements, so long as the rejection occurs *before* the tariffs become effective (Pet. App. 24a-26a); but it

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[15] The petition originally sought review of the interim Commission decision of August 1980 (J.A. 9). While the petition for review was pending, the Commission entered its final decision, and the court of appeals accordingly limited its review to that decision (Pet. App. 3a n.3).

[16] The court invalidated the portion of the rules dealing with blanket special permission authority, on the ground that the Commission had failed to provide adequate opportunity for notice and comment (Pet. App. 16a).

held that when an *effective* tariff is found to be unlawful, the Commission's powers under the Act extend only to determining what is the proper rate, and awarding actual damages. The court read the statutory authority to reject tariffs (49 U.S.C. 10762(e)), like the suspension authority in 49 U.S.C. 10708, as limited to *proposed* tariffs; it found no such authority with regard to tariffs that have become effective, and concluded that its prior decisions and those of this Court were inconsistent with the assertion of that authority (Pet. App. 28a). Moreover, the court of appeals asserted that requiring the carrier to refund, as an overcharge, the difference between the rate paid under an effective tariff and the former tariff "undermines the uniformity and reliability interests that the system of tariff filings was meant to foster" (Pet. App. 28a). Finally, the court distinguished the "two lines of cases" that it recognized "shed doubt" on its conclusion (Pet. App. 29a).

SUMMARY OF ARGUMENT

The question presented in this case is whether, in cases where a motor carrier rate seriously violates an approved rate bureau agreement, and that rate is filed with the ICC, the ICC loses the power to reject the rate as unlawful ab initio (and thus to create a basis for overcharge liability) solely because the violation was not immediately discovered and the rate has gone into effect.

The court of appeals held that the Commission wholly lacks power ever to reject a rate after it has gone into effect, notwithstanding that the rate may be in egregious violation of the stringent limitations that Congress in 1980 imposed on the right of motor carriers to enter into collusive pricing arrangements

through the activities of rate bureaus. In so holding, that court imposed a rigid limitation on the discretion of the Commission to create a remedial regime adapted to serve the policies of the Act—a limitation not justified by the statutory language, by the relevant case law, or by the policies of the Act. Accordingly, that court's decision should be reversed.

1. Section 10762(e) of the Interstate Commerce Act authorizes the Commission to reject any tariff if that tariff violates the Act or regulations of the Commission issued thereunder. (Correspondingly, Section 11705(b)(1) provides that shippers may recover overcharges.) The statutory language—in explicit contrast to that governing the Commission's power to *suspend* tariffs—is in no way limited to *proposed* tariffs and does not impose time constraints on the use of the rejection remedy. The Commission, in line with the natural thrust of the statutory language, has long asserted that it may reject rates even after they have gone into effect if doing so will serve important regulatory purposes; its entirely reasonable construction of its own governing statute should have been sustained.

2. Even if the statutory language were more ambiguous than it in fact is, the Commission's interpretation of its rejection authority should be upheld as reasonably ancillary to its statutory mission. It is wholly unrealistic to think that all (or even most) filings can be fully investigated immediately to make sure that they are not violative of relevant rate bureau agreements. The court of appeals' decision in effect confers on carriers the right to retain the fruits of those violations as long as they can get the relevant tariff into effect. And it does so notwithstanding Congress' carefully designed plan severely to limit

the area within which carriers are free to engage in cartel pricing free of the constraints of the antitrust laws.

In contrast, the Commission's rejection plan is a focused and effective remedial scheme, designed to assure that in cases of—and only in cases of—serious violation, carriers will not be permitted to retain the benefits of charges which all agree to have been imposed without lawful authority.

3. The relevant case law strongly supports the Commission's authority to reject tariffs even after they have become effective. This Court has upheld such authority in connection with the Natural Gas Act, see *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 347 (1956); and thoughtful lower-court opinions have done so under the Interstate Commerce Act provisions in dispute here. See, *e.g.*, *Chicago, M., St. P. & P. R.R.* v. *Alouette Peat Products*, 253 F.2d 449 (9th Cir. 1957) and *Aberdeen & Rockfish R.R.* v. *United States*, 682 F.2d 1092 (5th Cir. 1982), petition for cert. pending, No. 82-707. The cases relied on by the court of appeals, on the other hand, do not support its judgment.

4. The court of appeals' argument that the invalidation of tariffs once they have gone into effect would disturb the Act's policies of tariff uniformity and reliability is without support in the Interstate Commerce Act or the decisions of this Court. The emphasis of the lower court on the importance of rate uniformity is inconsistent with the most recent expression of congressional policy; Congress made it crystal clear in 1980 that it was interested in price competition much more than price uniformity. In any event, the rejection of effective tariffs after the full hearing contemplated by the Commission would not

undermine that uniformity any more than does the complaint procedure which permits a shipper to challenge motor carrier rates at *any* time under 49 U.S.C. 11701, and to recover damages if those rates are found to be unlawful. Thus, carriers can never be certain that their rates will not be found unlawful or that they will not have to make refunds to shippers. In fact, carriers who commit serious violations of rate bureau agreements should not be allowed to justify those violations in reliance on any such certainty. It was thus a wholly appropriate exercise of discretion for the Commission, after careful consideration, to conclude that invalidating ab initio tariffs that reflect clear violations of rate bureau agreements would be the most effective way to ensure compliance with these agreements.

ARGUMENT

THE COMMISSION HAS AUTHORITY TO REJECT TARIFFS THAT ARE UNLAWFUL BECAUSE THEY SERIOUSLY VIOLATE RATE BUREAU AGREEMENTS WHETHER OR NOT THE TARIFF HAS GONE INTO EFFECT

It is undisputed that the collective formulation of a motor carrier rate contrary to an approved rate bureau agreement violates the Interstate Commerce Act (as well as the antitrust laws) and warrants remedial action by the Commission (Pet. App. 24a-25a). See also *Board of Trade* v. *ICC*, 646 F.2d 1187, 1192 (7th Cir. 1981) (ICC *must* find tariffs formulated in violation of rate bureau agreement unlawful). It is also undisputed that the remedies available to the Commission include disapproval of the rate bureau's agreement (which terminates the antitrust immunity conferred by 49 U.S.C. 10706(b)(2)), rejection or suspension of unlawfully formu-

lated tariffs *before* they become effective, and prospective cancellation of tariffs (with attendant liability for any proven damages) if the violations are discovered after the tariffs have gone into effect (Pet. App. 24a-25a, 27a-28a). Thus, the only issue before this Court in this case is whether the Commission's power to reject and thereby render a tariff void ab initio is confined to the preeffective period.

The court of appeals held that rejection of a tariff after it has become effective is beyond the Commission's statutory power. But the Act's authorization to the Commission to reject tariffs that violate the Act or any regulation issued thereunder does not depend on when the defect is discovered. Nor is there any provision of the Interstate Commerce Act or decision of this Court that restricts the Commission's power to select an appropriate remedy for violations of the Act's provisions narrowly confining the right to engage in collusive pricing. To the contrary, this Court has established that administrative agencies have a duty to exercise their discretion to choose remedies that will best advance the purposes of the statutes they administer. Because the Commission's choice of the rejection remedy for rate bureau agreement violations is entirely consistent with this controlling principle, and because the remedy is not foreclosed by the Act, the Court should affirm the agency's power to reject tariffs after they have become effective.

A. The Interstate Commerce Act Does Not Limit Tariff Rejection To The Period Before The Tariff Goes Into Effect

Section 10762(e) provides that:

> [t]he Commission may reject a tariff submitted to it by a common carrier under this section if

> that tariff violates this section or regulation of the Commission carrying out this section.

This language contains no time constraints and is in no way limited to proposed or ineffective tariffs. Thus, taken at face value, the statute empowers the Commission to reject any tariff violating the Act.[17]

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[17] The statute refers to violations of "this section." Section 10762 sets forth requirements with respect to filing and publication of tariffs. It is nevertheless established that the Commission may reject tariffs for substantive, as well as formal procedural violations of the Act. The court of appeals explained (Pet. App. 25a-26a, footnote omitted):

> "Although filing defects are the primary focus of the rejection power, *see* 49 U.S.C. § 10762(e); *Southern Motor Carriers Rate Conference* v. *U.S.*, 676 F.2d 1374, 1376 (11th Cir. 1982) (discussing rejection for publication errors), courts have frequently held that the power is not strictly limited to these defects. The seminal case is *Municipal Light Boards* v. *FPC*, 450 F.2d 1341, 1346 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989, 92 S.Ct. 1251, 31 L.Ed.2d 455 (1972), whose reasoning we adopt here:
>
> > [Rejection] is a peremptory form of response to filed tariffs * * *. Its use is not limited to defects of form. It may be used by an agency where the filing is so patently a nullity as a matter of substantive law, that administrative efficiency and justice are furthered by obviating any docket at the threshold rather than opening a futile docket . . . . [A] rate filing may be rejected both when the governing statute explicitly provides for rejection and when it does not. The Commission ha[s] authority to issue a regulation . . . for the rejection of filings that patently fail to establish substantial compliance with [the Act and] duly issued regulations. This rests on its basic statutory authority to issue regulations . . . to carry out the provisions of the Act.
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> *Accord, United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 347, 76 S.Ct. 373, 382, 100 L.Ed. 373

See *Aberdeen & Rockfish R.R.* v. *United States, supra,* 682 F.2d at 1097-1099.[18] Indeed, until the Interstate Commerce Act was recodified in 1978,[19] the forerunner of Section 10762(e) (49 U.S.C. (1976 ed.) 217(a)) provided:

> * * * the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

(1956) ("There can be no doubt of the authority of the Commission to reject [an] unauthorized filing under its general powers to issue orders 'necessary or appropriate to carry out the provisions of this Act.' "); *North Central Truck Lines, Inc.* v. *ICC,* 559 F.2d 802, 804-05 (D.C. Cir. 1977); *Delta Airlines, Inc.* v. *CAB,* 543 F.2d 247, 264 (D.C. Cir. 1976); *W.J. Dillner Transfer Co.* v. *U.S.,* 214 F.Supp. 941, 946 (W.D.Pa. 1963)."

[18] The *Aberdeen* court correctly rejected (682 F.2d at 1097) the "imaginative, but sophistic," argument that, since Section 10762 governs the publishing and filing of *proposed* tariffs, the authority to reject a tariff submitted "under this section" should be limited to proposed tariffs:

> Section 10762 does not confine itself to proposed tariffs; it prescribes general rules for the filing of tariffs, and they obviously must remain on file after going into effect * * *. Moreover, since section 10762 is the source of all tariff publication and filing requirements, any tariff, proposed or effective, must have been submitted to the Commission "under this section".

[19] This recodification was not intended to enact any substantive changes in the prior statute. H.R. Rep. No. 95-1395, 95th Cong., 2d Sess. 9 (1978); *Chicago & Northwestern Transportation Co.* v. *Kalo Brick & Tile Co.,* 450 U.S. 311, 319 n.7 (1981); *Fourco Glass Co.* v. *Transmirra Products Corp.,* 353 U.S. 222, 227 (1957).

Because a tariff obviously cannot be "used" before it is effective, the fact that the statute barred all "use" of unlawfully established tariffs indicates that Congress anticipated that some tariffs would be in effect when rejected by the ICC. And the tariff suspension provisions of the Act (49 U.S.C. 10708)—which are expressly limited to "proposed" tariffs—show that where Congress wished to limit the Commission's power to act to the time before a tariff becomes effective, it expressed itself explicitly to that end.[20]

The Commission has long assumed the authority to reject effective rates that do not comply with the Act or Commission regulations, thereby allowing shippers to claim overcharges from the time of the asserted effective date. See, *e.g.*, *Mercer Valley Ry.* v. *Pennsylvania Ry.*, 69 I.C.C. 233, 234 (1922) (tariffs filed by a non-common carrier of no force and effect); *Acme Fast Freight Inc., Common Carrier Application*, 17 M.C.C. 549, 556-557 (1939), sustained, 30 F. Supp. 968 (S.D.N.Y.), aff'd, 309 U.S. 638 (1940) (tariffs filed by freight forwarders, not common carriers, stricken from ICC files); *Bell Potato Chip Co.* v. *Aberdeen*, 43 M.C.C. 337, 343 (1944) (duty of carrier to refund overcharges where rates charged for past shipments found inapplicable because unlawful); *National Association of Specialized Carriers Inc., Agent-Show Cause and Strike Order*, ICC Order No. 36870 (Apr. 11, 1978) (tariff publication not submitted to certain tariff subscribers before its effective

[20] It should be noted that tariff suspension is summary and unreviewable (*Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979)). In contrast, the rejection procedure contemplates a full hearing, and the Commission's action is subject to full judicial review. Cf. *Delta Airlines, Inc.* v. *CAB*, 543 F.2d 247 (D.C. Cir. 1976).

date declared null and void); *Conrail Surcharge on Pulpwood*, 362 I.C.C. 740, 755 (1980) (carrier required to refund all monies collected under schedules establishing unlawful rate surcharge).

As the Commission stated in rejecting rates that were published after less than the required statutory notice in *H.J. Baker & Bros.*, 357 I.C.C. 640, 644-645 (1978) (emphasis supplied):

> The tariffs on file, although unlawful, specified the applicable rate which the shippers were bound to pay, pursuant to the Act. The act requires strict observance of the tariff regardless of the inherent unlawfulness of the rates specified. However, when and if the rates are shown to be unlawful for any reason, shippers are entitled to recover the difference between what they paid under the applicable tariff and what is subsequently determined to be the lawful rate. * * * *Rates and charges unlawfully established whether in the method of filing or contrary to specific Commission orders are not due the carrier.*

The rejection rule in question in this case exactly reflects the broad power conferred by Section 10762 (e).[21] In contrast, the court of appeals ignored not only the plain language of the Act, but the established principle that an agency's reasonable construction of its governing statute should be sustained. *E.g.*, *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 590 (1981); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16

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[21] And, of course, the fact that the statute expressly provides for other enforcement powers, such as investigation and a determination of unlawfulness pursuant to 49 U.S.C. 10704 (a)(1), does not suggest that Section 10762(e) should not be read broadly, in accord with its plain terms.

(1965); *United States* v. *American Trucking Associations*, 310 U.S. 534, 539 (1940).

It is true that the statute provides that shippers may recover their actual damages if it is determined that a filed and effective rate is unlawful. 49 U.S.C. 11705(b)(2) and (3). But it explicitly provides, in addition, for recovery of charges "exceed[ing] the applicable rate"—*i.e.*, overcharges in excess of a lawfully filed tariff.[22] The question of when the over-

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[22] Until the 1978 recodification of the Interstate Commerce Act, former Section 16(3)(g) (49 U.S.C. (1976 ed.) 16(3)(g)) defined overcharges subject to recoupment by the shipper as "charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission." See *Chicago, M., St. P. & P. R.R.* v. *Alouette Peat Products*, *supra*, 253 F.2d at 455-457 and *H. J. Baker & Bros.*, *supra*, 357 I.C.C. at 642-646 (tariff must be both "applicable" and "lawfully on file" in order to be fully collectible).

When the Interstate Commerce Act was recodified in 1978, Congress replaced Section 16(3)(g) with 49 U.S.C. 11705(b)(1), which allows the shipper to recover for "amounts charged that exceed the applicable rate for transportation or service contained in a tariff filed under [the Act's tariff filing requirements]."

In *Aberdeen & Rockfish*, *supra*, 682 F.2d at 1102-1103, the court of appeals correctly concluded that Congress, in eliminating the words "lawfully on file," could not have intended to restrict use of the overcharge remedy to cases where there is no applicable tariff on file. Stressing that the recodification intended no substantive change (see n. 19, *supra*), the court explained:

> * * * the revised wording still creates overcharge liability for charges that exceed the rate "contained in a tariff filed under [the Act]." Since a well accepted meaning of "under" as used in legal writings is "in accordance with", section 11705(b)(1) remains subject to the interpreta-

charge remedy should be available as an alternative to the damage remedy is appropriately a matter for the Commission's considered discretion in tailoring a remedial scheme to effectuate the policies of the Act. Here, it was the Commission's considered judgment that, in cases where there is a serious violation of a rate bureau agreement, the unlawful tariff should be voided ab initio and overcharges refunded to shippers. That judgment was carefully calibrated to further Congress' policy decision that the cartel activities of rate bureaus must be strictly confined. The Commission's conclusion, made in accordance with the terms of the Act, should, accordingly, be sustained.

B. Rejection Of Unlawful Tariffs That Have Become Effective Is A "Legitimate, Reasonable, And Direct" Adjunct To The Statutory Mandate That Carriers Must Comply Strictly With Approved Rate Bureau Agreements

This Court has established that the Commission's enforcement powers are not confined to those expressly spelled out in the Act. *Trans-Alaska Pipeline Rate Cases*, 436 U.S. 631, 654 (1978) (*"TAPS"*) (pursuant to the suspension power, the Commission properly ordered carriers to keep account of and refund amounts collected under interim rates); *United States* v. *Chesapeake & O. R.R.*, 426 U.S. 500 (1976) (Commission empowered to insist that the proceeds of a proposed general rail rate increase be used to pay for deferred maintenance); *Permian Basin Area*

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tion that a rate increase is not collectible unless it appears in a tariff filed in accordance with section 10762.

Thus, the statute allows the Commission to require the repayment of overcharges when it concludes either that a tariff is not applicable or that it is not lawful.

Rate Cases, 390 U.S. 747, 774-777 (1968). As the Court stated when affirming the Commission's exercise of the ancillary power to regulate motor carrier leasing practices, "[i]t is an unnatural construction of the Act which would require the Commission to sit idly by and wink at practices that lead to violation of its provisions." *American Trucking Associations, Inc.* v. *United States*, 344 U.S. 298, 311 (1953).

The touchstone of ancillary power is a "legitimate, reasonable, and direct" relationship between the power asserted and the statutory mandate. *TAPS*, *supra*, 436 U.S. at 654. When such a relationship exists, the Act should be construed to confer upon the Commission the necessary enforcement power, unless language in the statute plainly requires a contrary result. *Id.* at 655-656. Because there is a legitimate, direct, and reasonable relationship between the voiding of effective tariffs that seriously violate rate bureau agreements, and the statutory mandate that carriers adhere strictly to their approved collective ratemaking agreements as a condition for antitrust immunity, the Act should be construed to permit rejection of such tariffs.[23]

1. The Commission's rejection rule is a reasonable enforcement device. Even the court of appeals agreed that once a violation is discovered, carriers cannot

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[23] The change from pre-filing examination of all tariff filings to a system of spot checking (see p. 3, *supra*), has meant that a substantial number of rate bureau filings that would have been suspended under the old procedures for technical defects are now allowed to become effective. Thus, unless the Commission can reject effective tariffs, carriers in rate bureaus will obtain an unwarranted advantage over shippers simply because of the change in Commission procedures mandated by considerations of economy.

continue collecting rates named in unlawfully formulated but already effective tariffs (Pet. App. 22a, n.22, 27a). The court also held that the Commission can suspend or reject such tariffs before they become effective if the agency learns of the violation in time. These two undisputed holdings establish that carriers are not entitled to collect rates if those rates reflect rate bureau violations. The Commission's rule is the logical completion of this principle; it ensures that carriers will not benefit from tariffs that violate the commerce (and antitrust) laws in a significant manner, without regard to when the violation is discovered. Thus, the Commission's rule rejects the notion that carriers somehow acquire a right to collect and retain otherwise indisputably unlawful charges if they can just get the unlawful tariffs into effect.

As Congress emphasized in enacting the 1980 Act, a major function of Section 10706 was to increase competition among carriers by spelling out strict limits on the permissible scope of collective ratemaking (H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 3-4, 10, 27-29 (1980); S. Rep. No. 96-641, 96th Cong., 2d Sess. 13-14 (1980)). That section reflects a careful balancing by Congress of the competing policies reflected in the antitrust laws and the Interstate Commerce Act. Congress concluded that the public interest justifies permitting certain exceptions to the antitrust laws; but it went to elaborate lengths to assure that those exceptions be limited to specifically described categories of action. Like all limitations on the national commitment to the policy of free markets and open competition, these exceptions should in any event be narrowly construed. See, *e.g.*, *Union Labor Life Insurance Co.* v. *Pireno*, No. 81-389 (June 28, 1982), slip. op. 5; *National Gerimedical Hospital*

v. *Blue Cross*, 452 U.S. 378, 388-389 (1981). Accordingly, collective ratemaking should be carefully confined to situations where the carriers have complied scrupulously with the terms of Commission-approved agreements. Since compliance with those agreements is the keystone of the structure of the 1980 Act, an administrative sanction that will effectively assure such compliance is essential to effective implementation of the statute.

Rejection is just such a sanction. It is an immediate, narrowly focused, and effective remedy for rate bureau violations because it denies the carriers any benefit from collusive rates improperly arrived at. Rejection is particularly important because rates formulated in violation of an agreement may nevertheless still be nondiscriminatory and within the zone of reasonableness. Accordingly, shippers may be unable to show the damages necessary to justify reparations under 49 U.S.C. 11705(b)(3). The court of appeals' rule, which limits the Commission to prospective cancellation and damages awards, would thus permit carriers to benefit from improperly established rates until the violations are discovered.[24] By denying the

[24] None of the statutory alternatives to rejection noted by the court of appeals (Pet. App. 27a) prevents carriers from benefiting from an unlawfully established rate. The prescription remedy (see 49 U.S.C. 10704(b)(1)) is prospective only, and, like the ability to recover damages, is significant only if a rate is shown to be unreasonably high. The alternative of cancelling an unlawfully established tariff for the future would allow the carrier to retain all charges already collected under an unlawful rate, and thus has little deterrent value. Although antitrust remedies may often be available against a carrier that violates a rate bureau agreement, the Commission cannot impose them. It is important that the Commission, which is responsible for enforcing a rate bureau's com-

Commission an effective enforcement tool, the court of appeals' ruling makes it more likely that rates will be formulated in violation of bureau agreements by providing carriers an incentive to do so.

The court below appears to have been concerned (Pet. App. 28a) that the Commission will routinely reject effective tariffs for insignificant errors and therefore will "create a legalized but endless chain of departures from the tariff." But this fear is unfounded. The Commission has discretion to accept tariffs that are not in perfect compliance with statutory requirements. See *Providence & Worcester Co.* v. *United States*, 666 F.2d 736 (1st Cir. 1982). Indeed, the Commission, on numerous occasions, has itself recognized that overcharge liability may be unfair where a defect causes no real harm or where a carrier had no clear notice of what was expected. See *Genstar Chemical, Ltd.* v. *ICC*, 665 F.2d 1304 (D.C. Cir. 1981), cert. denied, 456 U.S. 905 (1982); *National Insulation Transportation Committee* v. *ICC*, 683 F.2d 533 (D.C. Cir. 1982). Consistent with that approach, the Commission proposes to reject tariffs after they have gone into effect only for "significant" agreement violations. For example, the Commission might reject tariffs filed by carriers which had engaged in collusion without benefit of an approved agreement; or tariffs based on agreements on single line rates between direct competitors after 1983; or a tariff filed on behalf of a member of a rate bureau that did not reflect his independent action (see n.27, *infra*).[28] In every case under the rule at issue here, the Com-

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pliance with its approved agreement, have the power to impose sanctions for noncompliance (Pet. App. 24a-25a).

[28] In general, rejection will be used for the sort of violations which, if discovered before the rates became effective,

mission will have found, after hearing, both that there has been a clear and substantial violation of the agreement that confers antitrust immunity, and that rejection is the most appropriate remedy.[26]

2. a. Cases addressing analogous problems support the conclusion that rejection is a reasonable enforcement device. In *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, *supra*, 350 U.S. at 347, this Court held that a new rate schedule, purporting to change a contractual natural gas rate in a manner unauthorized by the Natural Gas Act, was a "nullity", that there was "no doubt" that the Federal Power Commission could reject such a schedule, and that all amounts paid under the illegal schedule should be refunded. Since the collective establishing of rates in violation of approved rate bureau agreements constitutes a violation of highly significant provisions of the Interstate Commerce Act, the ICC should have similar power to correct these violations.

Several lower courts have affirmed the principle that carriers may not avoid overcharge liability for defects discovered after a tariff has gone into effect.

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would lead to suspension. See *Reclassification of Pork Skins & Bacon Rinds, NMVC* (ICC I & S, Docket No. M-30360) (Aug. 4, 1982), pending review sub nom. *National Classification Committee* v. *United States*, No. 83-1866 (D.C. Cir.); cf. 49 U.S.C. 10706(b)(3)(B)-(D), Pet. App. 35a-58a.

[26] For this reason, fears that the rejection power will lead to windfall profits for shippers (cf. 82-707, Pet. 15-16) are without foundation. Moreover, where a carrier misquotes a rate and initially collects less than the tariff rate, the shipper is bound to pay the established rate when the error is discovered, even if the shipper has relied on the lower rate in making shipments and establishing prices. *Louisville & N. Ry.* v. *Maxwell*, 237 U.S. 94, 97 (1915); *Texas & P. Ry.* v. *Mugg*, 202 U.S. 242 (1906).

Chicago, M., St. P. & P. R.R. v. *Alouette Peat Products, supra,* involved a suit by shippers to recover overcharges because a rate increase was made effective on less than statutory notice. The court held that effective rates filed in violation of tariff publishing requirements could not be collected. The court stated that it was clear that if, on complaint to the Commission, a filed rate was proved to be unreasonable, the shipper was entitled under the Act to recover the difference between what it had paid and what the Commission found to be reasonable. The court saw no reason why a shipper should not be similarly protected where the rate is unlawful because it was not lawfully published (253 F.2d at 455). The court stated (*id.* at 456):

> A rate which is in fact unreasonable is not made reasonable by the mere act of filing, nor does the mere act of filing make lawful a publication not made in accordance with the provisions of the Act. Filing does not constitute publication, or cure a defective publication.

The court concluded that shippers were entitled to recover all sums paid in excess of the rate that had existed prior to the improperly established charges, since the preexisting rate was the only existing legally published rate. *Id.* at 456.[27]

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[27] In *Axinn & Sons Lumber Co.* v. *Long Island Ry.*, 466 F. Supp. 993 (E.D.N.Y. 1978), the court applied *Alouette Peat* and held a tariff provision void ab initio because it was published in violation of the Interstate Commerce Act. There, the Long Island Railroad was a party to joint rates, which the rate bureau to which Long Island belonged decided to increase. Although Long Island declined to agree with the increase (known as "flagging out"), the bureau published the increase for Long Island's account anyway. Making Long

Most recently, in *Aberdeen & Rockfish Ry.* v. *United States*, *supra*, the court upheld the Commission's authority to impose overcharge liability for improperly symbolized rate increases. The court observed (682 F.2d at 1104) that because the Commission can no longer afford to police the thousands of rate changes that are published weekly, it must shift the burden of ensuring exact compliance with symbolization requirements to the carriers themselves. In rejecting the carriers' claim that overcharge liability would be unfair, the court stated (682 F.2d at 1105):

> The predictable decline in intentional or negligent symbolization errors compensates, at least arguably, for the possibility of recovery by an unharmed shipper. After all, it is clear that a carrier is not *entitled* to a rate increase, just or otherwise, that has not been filed in the prescribed manner. Moreover, the Commission is correct in pointing out that the carriers can prevent windfall recoveries simply by carefully carrying out their own legal obligation to mark their rate increases.

Similarly, no liability will be incurred under the rules at issue in this case if carriers comply with the limitations in their approved rate bureau agreements.

Island a participant in the increases violated a Commission regulation and the rate bureau provisions of the Act. The court held that the increased tariff was void ab initio, because Long Island's concurrence was a prerequisite to a lawful tariff. Accordingly, the shippers could recover overcharges, because the increased tariff never went into lawful effect. Significantly, the court's holding did not depend on a finding that the increased rate was unreasonable. Rather, the court recognized that the increase with respect to Long Island was a nullity from the outset.

In sum, a tariff that has gone into effect establishes the rate which shippers must then pay. *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981). But such a rate is not necessarily a "lawful" rate; the Commission may, upon investigation, find it to be unreasonable or otherwise unlawful. *Arizona Grocery Co.* v. *Atchison, T. & S. F.*, 284 U.S. 370, 384 (1932); *United Gas Pipe Line Co., supra*; *Board of Trade* v. *ICC, supra*, 646 F.2d at 1192. In such a case, public policy requires that carriers should not be allowed to benefit from the unlawful tariff publication. See *Midlewest Motor Freight Bureau* v. *United States*, 433 F.2d 212, 238-239 (8th Cir. 1970); *ICC* v. *B&T Transportation Co.*, 613 F.2d 1182, 1183-1186 (1st Cir. 1980); *H.J. Baker & Bros., supra*, 357 I.C.C. at 644-645; *Acme Fast Freight Inc.—Common Carrier Application, supra*, 17 M.C.C. at 556, 557.

2. b. The cases upon which the court of appeals relied do not contravene the Commission's power to reject tariffs after they have become effective. The court of appeals asserted (Pet. App. 28a) that *Davis* v. *Portland Seed Co.*, 264 U.S. 403 (1924), establishes the proposition that illegality does not render a rate nonexistent or subject a carrier to overcharge liability. But that case will not support such a sweeping conclusion.[28] In *Davis*, a shipper had paid the lawful rate for shipping a commodity between two points. The carrier had also published a lower rate for a longer haul including those points without obtaining the required permission from the Commission to

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[28] *Davis* dealt with an entirely different part of the Act than is in issue here; it was decided 24 years before the Reed-Bulwinkle Act, authorizing rate bureaus, was enacted.

charge less for the longer haul than for the shorter haul. The shipper argued that the low rate for the longer haul—which was a rate forbidden by the Act—should now automatically become the maximum rate for all shorter hauls along that route, and hence that it was entitled to recovery for overcharges. Relying upon a consistent Commission practice of denying refunds for such violations without a showing of injury, the Court rejected that contention, explaining that "mere publication of the forbidden lower rate did not wholly efface the [properly published] higher intermediate one from the schedule and substitute for all purposes the lower one" (264 U.S. at 424-425) and that the shipper was limited to a damages remedy. The rationale of *Davis* does not apply to the instant situation. In *Davis*, the issue was whether the illegal lower rate automatically effaced the lawful higher rate, without any Commission intervention. Here, in contrast, the issue is whether the Commission can efface an illegally published rate in the exercise of its discretion to select appropriate remedies for violations of the Act. The Court's affirmance in *Davis* of the Commission's decision not to remedy violations of the long and short haul clause by using the offending ("forbidden") tariff as a rate floor does not suggest that the Commission has no power to reject rates that have been adopted in violation of express provisions of the Act. Indeed, to the extent *Davis* has any application at all to this situation, it supports the Commission's rule, because the Court refused to give the shipper the benefit of the "forbidden" rate. Here, the Commission proposes to deny the carrier any benefit from forbidden violations of rate bureau agreements.[29]

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[29] In *Berwind-White Coal Mining Co.* v. *Chicago & E. R.R.*, 235 U.S. 371, 375 (1914), cited by respondents in their brief

Nor does *Delta Air Lines, Inc.* v. *CAB, supra*, upon which the court below also relied (Pet. App. 28a), preclude ICC rejection of effective tariffs that violate rate bureau agreements. The court in *Delta* found that the CAB would have exceeded the limits of its delegated authority even if rejection had occurred prior to the tariff's effective date (543 F.2d at 259, 261, 264). This is plainly not the case here, because the court of appeals recognized that rate bureau violations may constitute substantial errors warranting rejection. Moreover, the court's primary concern in *Delta* was that the CAB, in violation of its statutory mandate, failed to conduct a required hearing before rejecting an effective tariff (543 F.2d at 259, 261, 267). In sharp contrast, the ICC's rejection provisions allow for complaint, answer, and reply, and fully satisfy the hearing requirement of 49 U.S.C. 10704(b)(2). Finally, the D.C. Circuit itself apparently rejects the Eleventh Circuit's reading of *Delta* in this context, since in its subsequent opinions the D.C. Circuit has viewed broadly the ICC's discretion to exercise its rejection authority. *North Central Truck Lines, Inc.* v. *ICC*, 559 F.2d 802, 803 (1977); *Genstar Chemical, Ltd.* v. *ICC*, *supra*. Thus, the D.C. Circuit has recognized the Commission's discretion to use its rejection remedy where it believes appropriate, and has never indicated that the ICC could not reject an effective tariff when the agency found it necessary to do so. In fact, in *Genstar*, the court specifically referred to the Commission's recent adoption of rules permitting it to require a refund of "all charges collected pursuant

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in response to our petition (at 5-6), the Court simply held that the alleged informalities were not grounds for invalidation of the tariff. See also *Texas & P. Ry.* v. *Cisco Oil Mill*, 204 U.S. 449 (1907).

to an improperly symbolized tariff" without suggesting that such rules exceeded the Commission's authority (665 F.2d at 1309).

The court of appeals also relied on *Genstar, supra*, but that case supports the Commission's tariff rejection rule, because it reaffirms the Commission's broad authority to fashion the most appropriate remedy for a given violation of the Act. 665 F.2d at 1309-1310 & n.3.[30] In *Genstar*, the Commission had already established 12% as the maximum reasonable rate increase, and carriers published a 14% increase. In that situation, forcing the carriers to refund the patently unlawful 2% difference was the most equitable and effective way to enforce the Act's mandate that rates be reasonable. See also *Ajayem Lumber Corp.* v. *Penn Central Transportation Co.*, 487 F.2d 179 (2d Cir. 1973), clarified and aff'd on rehearing, 496 F.2d 21, cert. denied, 419 U.S. 884 (1974). Here, in contrast, the *Genstar* remedy is not an effective remedy, because shippers may be unable to prove that even a rate formulated in blatant violation of a rate bureau's agreement is outside the zone of reasonableness. The fact that a remedy happened to be particularly appropriate in a case involving rate reasonableness, like *Genstar*, is no reason to confine the Commission to using the same remedy where it is entirely inappropriate, as in a case where carriers have developed a rate in clear violation of their approved agreement.[31]

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[30] That authority has been repeatedly recognized. *TAPS, supra*, 436 U.S. at 654-657; *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 130 (1962); *Moss* v. *CAB*, 521 F.2d 298, 304 (D.C. Cir. 1965), cert. denied, 424 U.S. 966 (1966).

[31] The court of appeals also quoted (Pet. App. 8a) this Court's decision in *TAPS, supra*, 436 U.S. at 640, to support the proposition that rejection can only occur before a rate

In sum, only the Eleventh Circuit has held that the Commission can never reject tariffs after they have gone into effect. All of the other courts that have addressed analogous issues have concluded that the Commission (or analogous agencies) should have discretion to choose among remedial tools made available by the statute in order to effectuate its purposes. In light of the reasonableness of the Commission's remedial policy choice in this case, and in light of the absence of any statutory indication that that choice is barred, those decisions give strong support to the Commission's rule.

C. The Commission's Order Properly Implements The Policies Of The Act

The court of appeals incorrectly found support for its conclusion that the Act bars rejection of effective tariffs in the policies of the Interstate Commerce Act. The court of appeals held (Pet. App. 28a) that the overcharge liability created by the rejection of tariffs after they have gone into effect[32] undermines the "uniformity and reliability interests" the tariff system was meant to foster. See also *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 676 F.2d 1374, 1378 (11th Cir. 1982). This policy an-

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becomes effective. The quoted language, however, simply states that before the Commission obtained suspension authority in the Hepburn Act of 1906, the only remedy for unreasonably high rates was damages. The Court did not even address the ICC's rejection authority. In any event, the Commission here is concerned not with violations of the reasonableness statute, 49 U.S.C. 10701(a), but with violations of the rate bureau provisions in 49 U.S.C. 10706(b).

[32] The Commission does not itself award overcharges to shippers via motor carrier. Instead, to obtain enforcement of a Commission rejection order, a shipper will have to bring a civil action in district court. See 49 U.S.C. 11705(a).

alysis is faulty for two reasons. First, the court below ignored the fact that the Motor Carrier Act of 1980, 49 U.S.C. 10101 *et seq.*, has reduced the prior emphasis on rate uniformity by encouraging increased competition among carriers; carriers may now offer a variety of quality and price options to shippers. Regarding rate bureaus specifically, Congress recognized that the bureaus promoted predictability in rates, but then deliberately took elaborate steps to inject more competitive pricing into the motor carrier rate system. For example, it prohibited collective action in regard to certain matters—including single line rates [33] and certain rates that reflect limitations on liability—and placed strict limitations on rate bureau treatment of independent actions by bureau members.[34] H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 27-28 (1980). Thus, the emphasis of the court of appeals on the importance of rate uniformity is inconsistent with the most recent expression of Congressional policy.

Second, even if tariff uniformity were still a primary statutory goal, rejection of effective tariffs after the full hearing contemplated by the Commission would not undermine that goal any more than does the complaint procedure accepted without question by the court of appeals (Pet. App. 27a 28a).

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[33] The prohibition on collective ratemaking for single line rates was to become effective in 1984, in order to give the carriers time to adjust their pricing procedures (H.R. Rep. 96-1069, 96th Cong., 2d Sess. 28 (1980)). Congress thus evidently anticipated that the changes in the statute would encourage individual carriers to establish new, presumably more competitive, prices.

[34] Rate bureaus may not protest independent actions by a member, rate bureau employees may not act on such proposals, and bureau discussions may not include discussions of individual markets or rates after 1983.

The complaint procedure created by 49 U.S.C. 11701 permits a challenge to motor carrier rates at *any* time and provides that a shipper who can show that a rate is unreasonable is entitled to damages—that is, to a refund of the unreasonable portion of the rate. 49 U.S.C. 11705(b)(2) and (3). Thus, the mere fact that a rate is effective can never assure carriers that their rates will not be found unlawful, or that they will not have to make refunds to shippers.

In sum, the holding of the court of appeals that the Commission can never reject an effective tariff is not compelled by statute, legal precedent or policy. Moreover, the Commission's decision to invalidate tariffs found to have significantly violated an approved motor carrier rate bureau agreement is an appropriate exercise of agency discretion, and properly implements the policies of the Act by denying carriers a financial incentive to attempt to charge rates in violation of rate bureau agreements.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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